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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re X
: Chapter 11 Case
Allegiance Telecom, Inc., et al.,: No. 03-13057(RDD)
Debtors. : Jointly

X Administered

MARK TRESNOWSKI
New York, New York
Wednesday, October 1, 2003

Reported by:
Kathy S. Klepfer, RMR
Job No. 401

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October 1, 2003

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DEPOSITION of MARK TRESNOWSKI,
pursuant to notice at the offices of Akin,
Gump, Strauss, Hauer & Feld, LLP, 590
Madison, New York, New York, before Kathy S.
Klepfer, a Registered Merit Reporter and
Notary Public of the State of New York.

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APPEARANCES

AKIN, GUMP, STRAUSS, HAUER & FELD, LLP
Attorneys for the Official Committee of Unsecured
Creditors

590 Madison Avenue

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7 New York, New York 10022-2524
8 BY: PHILIP C. DUBLIN, ESQ.
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12 Attorneys for Impala Partners, LLC
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14 New York, New York 10016
15 BY: STEPHEN M. RATHKOPF, ESQ.
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18 Attorneys for Debtors and Debtors in Possession and
19 the Witness
20 Citigroup Center
21 153 East 53rd Street
22 New York, New York 10022-4611
23 BY: JONATHAN S. HENES, ESQ.
24
25 ALSO PRESENT:
PAUL A. STREET

□

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1
2 IT IS HEREBY STIPULATED AND AGREED, by and
3 between counsel for the respective parties
4 hereto, that the sealing and filing of the
5 within deposition be waived; that such
6 deposition may be signed and sworn to before any
7 officer authorized to administer an oath; that
8 all objections, except as to form are reserved
9 to the time of trial.

14 the Allegiance Telecom bankruptcy case.

15 We're here today in connection with
16 the debtors' motion with respect to the
17 retention of Impala Partners, LLC with respect
18 to their fee arrangement, and they operate as
19 the debtors' CRO.

20 I'm going to ask you a series of
21 questions today, and to the extent that I ask
22 you a question and you determine that it's
23 unintelligible, or if you have a problem
24 understanding any part of it, please stop me,
25 let me know what you don't understand, and I'll

□

6

1 Tresnowski
2 be happy, to the best of my ability, to try to
3 make it more clear.

4 If you need to take a break, just let
5 me know, and I'll be happy to accommodate you,
6 except to the extent we are in the middle of a
7 question. If you just would answer that
8 question and then we can go ahead and take a
9 break.

10 Can you please state your full name
11 for the record?

12 A. Mark Tresnowski.

13 Q. I'm going to skip the usual
14 formalities. I think you have been through this
15 process a number of times. We don't need to
16 know your title or your education. We're all

10-1-03 - Allegiance - Tresnowski.txt
17 aware of that already.

18 what did you do to prepare for today's
19 deposition?

20 A. I really didn't do anything in the way
21 of document review. All I really did was just
22 kind of go through my own recollection and
23 remember -- try to refresh myself without the
24 aid of any documents or discussions with others
25 as to the events that led up to the retention of

□

7

1 Tresnowski
2 Impala and what they have done at Allegiance
3 and, in particular, the discussions surrounding
4 their engagement letter.

5 Q. So you did not discuss with counsel or
6 any other party your deposition today or what
7 you would be discussing?

8 A. No, I did not.

9 Q. Is there any reason at all why you
10 feel like you would not be able to testify
11 today?

12 A. No.

13 Q. What is your recollection of when the
14 relationship between Allegiance and Impala
15 began?

16 A. It began in the late May, early June
17 timeframe. The genesis of the relationship was
18 a suggestion by the senior creditors that we
19 consider retaining a CRO, chief restructuring
20 officer, or firm that engaged in operational

21 restructuring, and we considered that request
22 and then went out and did a number of things to
23 try to find someone who was good in that area.

24 Q. What's your general understanding of
25 what a CRO would be brought in to do for the

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1 Tresnowski
2 company?

3 A. I had no understanding prior to this
4 experience, so I'll start with that.

5 As I looked into the concept, and
6 again, initially it was suggested by our senior
7 creditor, so I started by saying, what do you
8 want? You're saying it's very important to get
9 someone like this. Why is it very important, so
10 what do you think they would bring to the
11 process?

12 And as I recall, they said that they
13 wanted, in our particular case, they wanted
14 someone who could do several things: One, just
15 do an independent assessment of the company, and
16 by that I took them to mean from market
17 position, product offerings, personnel, just a
18 real independent, very experienced manager-type
19 people would come in and say, here's what we see
20 to not only them but to our board of directors
21 and the unsecured creditors.

22 They wanted someone who had skill and
23 experience in the bankruptcy process, in

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24 particular, the process of rejecting contracts,
25 cutting costs, using the tools of bankruptcy to

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1 Tresnowski
2 improve a company's cost structure and market
3 position.

4 I think one of the other aspects of
5 that is to also counsel the company during the
6 process as to what do you do to hold the company
7 together during this process, how do you deal
8 with morale issues, how do you deal with
9 customer perception issues. So that was also
10 part of it.

11 And I think the other thing that they
12 thought was important, and we tended to agree
13 with them, is that our case had landed in a, you
14 know, in a posture such that they thought it
15 would be helpful to get an independent party to
16 come in and communicate with the creditors and
17 say here's what we see.

18 I mean, they were very frank and they
19 said that, in terms of the business projections
20 and the understanding and view of the business'
21 future, they thought that the company didn't
22 have the kind of credibility that they wanted,
23 because this management team had operated the
24 company for so many years.

25 Q. Who initiated the contact between the

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3 included, and at least one and preferably two or
4 three members of the board of directors, and
5 then -- and I knew there were interviews going
6 on with the creditors. I guess I was less
7 involved in directing that.

8 I don't recall the day, but I was down
9 in Dallas when Paul was down in Dallas, and we
10 got together and talked about the potential
11 engagement, his experiences, and what they could
12 bring to us, what I thought we needed. And
13 then, you know, then I was very involved in the
14 process of selecting -- probably within a week
15 or two after that of selecting them as the CRO.

16 Q. What was it that you believed you
17 needed? You referenced that when you were
18 talking with Mr. Street you were talking about
19 what you thought you needed.

20 A. Yes, I think -- you know, it was
21 interesting. I think the creditors, the senior
22 creditors, if you will, came at this, you know,
23 as an, almost as a demand, that they actually
24 were going to hold up the cash collateral order
25 unless we did this. And I never quite

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1 Tresnowski
2 understood that because we didn't approach it as
3 a negative thing. I mean, we approached it as
4 something we certainly would want to look at.

5 And I think the specific things I had
6 in mind were that, you know, we had no one on

7 our management team, to my recollection, who had
8 ever gone through a bankruptcy process, myself
9 included. So we didn't have that kind of
10 expertise walking the halls down there.

11 Secondly, we -- and that brings with
12 it, again, as I said earlier, the contract
13 rejection activities, the employee morale
14 activities, the cost cutting activities,
15 everything that goes with it was something we
16 were going to cut our teeth on by ourselves.
17 And we had outside advisors, obviously. We had
18 a law firm and we had Greenhill, but we had no
19 one resident at the company who would deal with
20 that on a day-to-day basis, although we
21 certainly had planned to do the best we could.

22 So we saw value clearly there, and I
23 think I sat down with the creditors, senior
24 creditors, sorry, the week after the bankruptcy
25 and had a fairly sobering discussion with them

□

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1 Tresnowski
2 where they said, you know, your projections
3 don't have credibility. I contested that. I
4 said they should have credibility, and they were
5 put together in a credible way, but, I said,
6 it's important that you feel that way.

7 And they said, we don't think they
8 have credibility and, you know, they said, we
9 don't really know why it's often hard for

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someone's who's built a company from scratch to
11 see it accurately in a different market
12 environment, and so we really, really stress
13 that we think that you would benefit, we would
14 benefit, and the process would benefit by having
15 an outsider come in and live at the company and
16 produce a set of financials that had credibility
17 in their eyes.

18 Q. The projections that you are referring
19 to, is this what's commonly referred to as the
20 Triad III business plan?

21 A. I don't think so. No, I don't think
22 that's what -- they didn't refer to that
23 specifically. I think it was more of -- and I
24 don't think they were -- it wasn't my impression
25 they were looking at a set of projections and

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14

1 Tresnowski
2 saying those don't have credibility. I think
3 they were -- and I'm speculating a little bit
4 here, but I think they were sitting there
5 saying, you know, you folks have grown this
6 business from scratch into a company that's got,
7 you know, \$800 million in revenue, but you don't
8 understand bankruptcy, you don't understand how
9 you can cut costs, you don't have a real good
10 sense for the impact this will have on the
11 business, and you also suffer from looking at it
12 the way you've always looked at it and that
13 gives you a bias that makes us uncomfortable.

14 So we want someone else to come in here who
15 doesn't have that bias and give us a fresh look
16 at it.

17 Q. Those projections they were
18 discussing, were they prepared by the company or
19 by an advisor for the company?

20 A. The projections that were prepared
21 prior to Impala's arrival were really a joint
22 work product of the company and Greenhill.

23 Q. And it was the senior lenders' view
24 that the joint effort by the company and
25 Greenhill lacked credibility?

□

15

1 A. ^{Tresnowski}
2 I would state it differently. It was
3 their view that it would be much better if the
4 set of projections that they used to restructure
5 the company on that we all used came from --
6 benefited from the input of someone else like a
7 CRO.

8 Q. You mentioned earlier that you had
9 interviewed a number of different CRO
10 candidates. Who were they?

11 A. The three -- well, actually four, four
12 were given what I would call full consideration
13 down to the end. One was a group called CXO
14 based out of Austin and Dallas, I think; one was
15 a group -- it was an individual by the name of
16 Keith Maeb, M-A-E-B, I believe, who had been

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17 recommended by the senior creditors and works
18 more in an individual capacity; and then there
19 was another gentleman by the name of C.P -- the
20 initials C.P. -- Shangkar, and he didn't -- I
21 don't think he did -- he was more like an
22 executive-for-hire, and so he was a little bit
23 different than the typical. He didn't have a
24 lot of bankruptcy experience, but fresh ideas.
25 Some of our private equity investors had worked

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1 Tresnowski
2 with him and thought he was a good turn-around
3 guy, if you will; and then Impala, of course,
4 and then we took all four of those.

5 And with C.P. I don't think we ever
6 got to the discussion of compensation or
7 engagement terms. With the other three we did.
8 So he kind of -- I say that just to point out
9 that he kind of was dismissed from the process
10 before we got to the very end.

11 Q. Was this process with the other -- as
12 long as the process went on with these other
13 three candidates in addition to Impala, was it
14 the same process where the potential candidate
15 would come in and speak with a number of members
16 of the senior management and I think it was one
17 or two members of the board --

18 A. Yes.

19 Q. -- I think, was that on an individual
20 basis, or did they meet in groups with members

21 of senior management and board members?

22 A. It was on an individual basis, and it
23 was basically, depending on schedules, wherever
24 they could. I met with the CXO folks in New
25 York, for example. I met with Paul in Dallas.

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1 Tresnowski
2 Our senior managers met with all four
3 of them. Our directors -- those tended to be
4 individual meetings, like, you know, Paul may
5 have had dinner or breakfast with a director,
6 and I think in the case of Reid Hunt, I recall
7 it was a phone call. I don't think it was a
8 meeting. That's my recollection anyway.

9 But that was the process that was used
10 for all of them.

11 Q. So after you had interviewed these
12 four candidates, did everybody then get in a
13 room or get on a conference call or whatever it
14 was and compare notes and determine who they
15 thought would be the best candidate for the
16 company?

17 A. Yes.

18 Q. And did you take notes in connection
19 with these interviews?

20 A. I did not. I'm not a note-taker by --

21 Q. Do you know if any other members of
22 the senior management took notes?

23 A. I don't know. It would -- "I don't

1 Tresnowski
2 if there are board minutes from that vote?

3 A. There should be. I can check that.

4 MR. DUBLIN: Again, we would like to
5 get copies of the minutes from the meeting
6 where the board determined to select Impala.

7 Q. Why was it that -- I guess senior
8 management made the recommendation that Impala
9 should be the CRO for the company?

10 A. Yes.

11 Q. Why was it that Impala was chosen by
12 senior management as opposed to any of the other
13 three candidates?

14 A. First of all, I will say it was a very
15 strong sense of support for them, so it
16 wasn't -- in other words, it was not a close
17 call. And I think there were a number of
18 things. I think there was a sense of personal
19 fit with the style of Paul and Pete Keenoy --
20 Paul Street and Pete Keenoy. I met them both.

21 There was a tremendous amount of
22 respect for their experience. I mean, these
23 were -- they didn't fit the mold, at least the
24 mold as we saw it. A lot of the CRO candidates
25 seemed to be people who had an experience here

1 Tresnowski
2 or there and decided that they were chief

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3 restructuring officers, and here we had a team
4 of very seasoned executives, many from General
5 Electric, but then predating that to McKinsey &
6 Company, in the case of Paul.

7 And you know, it was, frankly, it was
8 just overwhelming that we were going to get some
9 seasoned executives who have seen any number of
10 businesses in different industries and have seen
11 companies that needed to be restructured,
12 companies that had worked, and we just thought
13 we were getting a lot. So it was a very, in a
14 sense, a very short discussion. It was one of
15 those things where you say, Dan, what do you
16 think? It's easy. Clay, what do you think?
17 Royce? You know, great.

18 Q. Was the decision to retain Impala made
19 before or after a discussion of the compensation
20 arrangement for Impala?

21 A. I think it was after. My
22 recollection -- that job usually falls to me, so
23 my recollection is I talked to Paul, as I did
24 with the other candidates, and I said, okay,
25 let's talk about money. And we had a very open

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1 Tresnowski
2 discussion about that, and so I had a sense for
3 what that was going to be and conveyed that to
4 the board. And so it was done prior to their
5 decision.

6 Q. I just want to show you a document
Page 18

7 real quick. I have copies for everybody. I'm
8 just going to give you all at the same time and
9 I'll reference which document we use.

10 A. Great.

11 Q. The first document we would like to
12 start with is the Motion of Debtors Pursuant to
13 Sections 105 and 363 of the Bankruptcy Code for
14 Approval of Services Agreement with Impala
15 Partners, LLC.

16 Please take a moment to review the
17 document.

18 (Pause.)

19 A. Okay.

20 Q. Have you ever seen this document
21 before?

22 A. I believe so.

23 Q. What is it?

24 A. This is the -- our motion to engage
25 Impala.

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1 Tresnowski
2 MR. DUBLIN: I'd like to mark this
3 exhibit as Tresnowski Exhibit 1.

4 (Tresnowski Exhibit 1, Motion of
5 Debtors Pursuant to Sections 105 and 363 of
6 the Bankruptcy Code for Approval of Services
7 Agreement with Impala Partners, LLC, marked
8 for identification, as of this date.)

9 Q. There is an exhibit to the motion.

10 10-1-03 - Allegiance - Tresnowski.txt
we'll just refer to it as "the motion," if
11 that's okay.
12 A. Sure.
13 Q. That contains Impala's letterhead?
14 A. Yes.
15 Q. It's dated July 11, 2003?
16 A. Yes.
17 Q. Just take a second to look that over.
18 A. Yes, I'm familiar with this.
19 Q. What is it?
20 A. This is the actual engagement letter
21 that we signed with Impala.
22 Q. The version that's attached, and I
23 believe this is the document that was filed with
24 the court, is not signed. To the extent counsel
25 can provide us with a signed copy, we would

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23

1 appreciate getting one. Tresnowski
2
3 A. Okay.
4 Q. Were you the person primarily
5 responsible for negotiating the terms of this
6 agreement for the debtors?
7 A. Yes, I was.
8 Q. If I can ask you to turn to the -- on
9 the first page, and just go to the third
10 paragraph that's labeled "Services."
11 A. Uh-huh.
12 Q. Can you tell me what this paragraph
13 describes as what Impala's role was going to be
Page 20

14 for the company?

15 A. I'm sorry, there's a paragraph labeled
16 "Services"?

17 Q. It's on the first page.

18 A. Oh, I'm sorry. Here it is. It's on
19 the first page.

20 MR. RATHKOPF: Objection to form.

21 A. I'm sorry, if you can repeat the
22 question. You want me to describe what it --
23 what the service are, or --

24 Q. If you can just tell me what this
25 paragraph says the role that CRO will perform

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1 Tresnowski
2 for the company.

3 A. Well, I wouldn't be comfortable doing
4 that unless I read it into the record, but
5 it's -- it is a, you know, a complete
6 description of the services that they will
7 perform -- I'm sorry, it's not a complete
8 description, it's a description that is
9 inclusive in the sense that it has some general
10 language and then some specifics, and those
11 specifics being a reduction of costs, an
12 increase in efficiency, improvement in sales
13 productivity and profitability, management of
14 operational bankruptcy task forces established
15 by the company, and developing the company's
16 long-term business strategy.

10-1-03 - Allegiance - Tresnowski.txt
17 Q. Is that what it says, that third
18 paragraph marked "Services," or is that just the
19 general, what you view as being the role as the
20 advisor as set forth in paragraph --
21 MR. HENES: Can I ask a question?
22 Since it's all stated here, can't we just --
23 it says what it says, right? I'm just not
24 sure why Mark has to read it.
25 MR. DUBLIN: I just want to make sure

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1 Tresnowski
2 he understands that the document says what
3 it says.
4 MR. HENES: Okay. Can you just ask
5 him if he understands that? That would be
6 easier.
7 Q. Do you understand that the purpose of
8 this document was to delineate the services --
9 among other things, delineate the services that
10 Impala will be providing for the debtor?
11 A. I don't understand it to be an
12 exclusive list of the services.
13 Q. If you look, please, at, again, that
14 paragraph, third paragraph labeled "Services,"
15 can you just read into the record that first
16 sentence.
17 A. "Impala shall serve as the company's
18 chief restructuring officer and provide advice
19 and information to the company in connection
20 with the restructuring."

21 Q. And then if you can turn to page 3 and
22 look at paragraph 5.

23 A. Yes.

24 Q. That's "Role as Advisor." I believe
25 that's the paragraph you were looking at a few

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1 Tresnowski
2 moments ago. Can you again read into the record
3 just the -- I think it's the tenth sentence, the
4 one that begins "Impala's primary
5 responsibility."

6 A. "Impala's primary responsibility is to
7 advise on the operational restructuring of the
8 company, including, but not limited to, (a) the
9 reduction of costs and expenses and
10 efficiencies; (b) the improvement of sales
11 productivity and profitability; (c) management
12 of the operational task forces established
13 within the company; and (4) developing the
14 company's long-term business strategy."

15 Q. Do you understand these four
16 delineated items to be the primary, I understand
17 not necessarily all of the responsibilities that
18 Impala may have for the debtors, but the primary
19 responsibilities?

20 A. I wouldn't -- no, I wouldn't say that.
21 I mean, I just -- you know, what it says is
22 their primary responsibility shall be to be the
23 operational restructuring officer, and that that

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24 primary responsibility will include 1 through 4,
25 but there might be other things. And we were

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1 Tresnowski
2 getting into this engagement like any
3 engagement: You want to leave some flexibility
4 and let it develop over time with the
5 circumstances. So it has a tendency to say that
6 you'll do these things and not these things.

7 Q. Do you think, broad strokes, the items
8 that are delineated here are typical or
9 commonplace of what a CRO would perform for a
10 company such as Allegiance in Chapter 11?

11 A. I really don't know.

12 Q. Again, let's go back to your initial
13 discussions that I believe, after your group had
14 coalesced around Impala, that you were then the
15 guy that was going to go negotiate with Paul and
16 with Peter to determine the fee structure and
17 the scope of the engagement.

18 In the course of these discussions,
19 did you discuss Impala's compensation or fee
20 arrangement?

21 A. Yes.

22 Q. And what was discussed with respect to
23 Impala's proposed fees?

24 A. We discussed two components: That
25 there would be a monthly fee, if you will, and

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3 Metropolitan Fiber Networks, and I think the fee
4 was 275, but -- and I also had some sense for
5 what other people were charging. This is a
6 experience not unlike hiring any professionals
7 in bankruptcy. Word gets out that you're hiring
8 someone of this kind and you get lots of e-mails
9 and calls, and so I actually, whether I wanted
10 it or not, I had the benefit of talking to more
11 than just those four.

12 Someone from Wilson Alvarez called and
13 someone from Glass something called. A lot of
14 people called and, you know, and what I
15 generally said was we're -- we've narrowed down
16 our focus, we're looking for something specific,
17 but, oh, by the way, if I thought about it, what
18 do you charge? And I would get numbers -- and
19 again, I didn't record this in any way, but I
20 would get numbers that were in the 200,000,
21 300,000 dollar a month range.

22 Q. You mentioned specifically MFN,
23 MetroMedia Fiber Network?

24 A. Yes.

25 Q. Do you remember which chief

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1 Tresnowski
2 restructuring officer, which firm that was?

3 A. I think that was Impala. That's why I
4 had looked at that.

5 Q. Did Impala provide you with any
6 comparables to look at?

7 A. I think Paul offered to do that. I
8 didn't -- I'm not really sure. I'm not really
9 sure.

10 Paul and I had a very frank discussion
11 about the number and what the right number was,
12 and, you know, in the context of getting a real
13 good sense from people I have talked to, looking
14 at some filings and knowing that this was
15 clearly in the ballpark, you know, I didn't want
16 to turn it into a three-week project because we
17 were in a sense of urgency to get going.

18 Q. And you just don't recall offhand,
19 other than MFN, what filings you had looked at?

20 A. I don't.

21 Q. And other than speaking with Wilson
22 Alvarez and I think it's Glass Associates --

23 A. Glass Associates, yes.

24 Q. -- you don't recall any other people
25 that you had had contacted with other than the

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1 Tresnowski
2 three firms you had interviewed?

3 A. Yes. Like I said, I did talk to the
4 other three and I talked specifically about fees
5 with CXO and with Keith Maeb. I may have talked
6 to Chris Nichols at GE Capital about it as well
7 because I think Chris had done somewhat of an
8 independent search and talked to a number of
9 people, some of whom we never did talk to,

10 but -- 10-1-03 - Allegiance - Tresnowski.txt

11 Q. Do you recall the monthly fee
12 structures that were posed by any of the other
13 three candidates that the company had
14 interviewed?

15 A. I don't have a specific recollection.
16 The only recollection I have is they were in
17 this ballpark.

18 Q. They were all in the 2 --

19 A. Kind of 2, 300,000 dollar a month
20 ballpark.

21 Q. Did each of those also include a
22 component for a success fee?

23 A. Yes, they did.

24 Q. We'll go back to that later on.

25 A. Sure.

□

32

1 Q. Tresnowski
2 were there any internal Allegiance
3 discussions about the compensation, potential
4 compensation arrangement among yourself and
5 others at the company?

6 A. Yes, there were.

7 Q. And with whom?

8 A. I know I talked to Dan and Royce about
9 it. We, you know, I mean, I think our approach
10 to this was like our approach to everything
11 else. We didn't want -- well, we've engaged a
12 lot of professionals over the course of the
13 company, and I had worked with Dan and Royce and

14 Tom in doing that, and, for better or worse, I
15 was an outside professional one time in my
16 career. So my view of this is, this project, in
17 any context is you don't want to pay more than
18 you have to pay, but if you're going to get good
19 people, you're going to pay prices that reflect
20 their experience, skills, and quality.

21 And so over the years, we have -- I
22 had a real good sense for the management team's
23 philosophy on this. Dan tends to be the most
24 frugal. He minds the budget. And so I know I
25 talked to Dan because he was working on the

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1 Tresnowski
2 budget and trying to cut costs everywhere he
3 could, and I asked him about this fee and we
4 talked about it and again ultimately agreed that
5 it was reasonable.

6 Q. Did the company request any of its
7 other retained professionals, whether it's
8 attorneys or Greenhill & Company, to put
9 together some type of comparable analysis of
10 restructuring advisory retentions in Chapter 11
11 cases?

12 A. I don't recall any.

13 Q. Do you recall if either of your
14 advisors had volunteered information with
15 respect to recent fee arrangements in connection
16 with retentions of chief restructuring officers

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in Chapter 11 cases?

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A. I recall -- well, when I said I didn't recall, I don't recall them preparing any kind of written summary of comparables, but I certainly recall talking to Kirkland -- certainly talking to Kirkland about what was reasonable, you know, what they thought was reasonable, and I probably talked to Mike Kramer at Greenhill as well.

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Tresnowski
Q. But no recollection of if you definitely talked to Mike Kramer or not?

A. No. No. Again, I think my reference point would have been, to a certain extent, Kirkland, but then also to a certain extent Chris Nichols at GE just because, again, this whole concept was something that was introduced by them and they had -- they had interviewed a lot of people and had used a lot of people in recent credit. So Chris seemed like someone who had a lot of recent market data.

Q. At the time of the discussions, they were before the execution of the engagement letter on July 11?

A. Yes.

Q. Were there discussions with respect to the success fee in addition to the monthly fee?

A. Yes.

Q. And what were those discussions?

21 A. Well, I said to Paul, what do you, you
22 know, what do you -- he made it clear there
23 would be a success fee. I didn't volunteer
24 that, but I wasn't surprised because Keith Maeb
25 at CXO had said there had also been a success

□

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1 Tresnowski
2 fee.

3 I asked them -- I asked Paul
4 specifically, I said, how do you -- you know,
5 what's the best way to approach this? Because I
6 don't know, every engagement's a little bit
7 different. And he said, they are a little bit
8 different and the best way to approach it is let
9 us get our feet wet, let us get on the ground
10 and let's come back to you with something that
11 we think makes sense and negotiate something.

12 Q. Were there any preliminary numbers
13 exchanged on the success fee prior to the
14 execution of the engagement letter on July 11th?

15 A. Very, very informally, in the sense
16 of, you know, could be 5 million, could be more,
17 could be less. I mean, I think 5 million was
18 kind of thrown out there, but it was going to --
19 don't really know what we're going to be faced
20 with here. You know, I don't want to recreate
21 the conversation because I probably would get it
22 wrong, but I know that from talking -- and it
23 was either with Paul or some of these other

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24 people, they get into a company and find out
25 there was a lot more work than they thought or

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1 Tresnowski
2 they would get into a company and they would
3 find out that there wasn't nearly as much work
4 as they thought. And so what they preferred to
5 do was go in and get the answers to those
6 questions and then talk about a fee that they
7 thought made sense.

8 And that was quite similar to the CXO
9 approach. They were not going to -- because I
10 pushed them too, and they said they would want
11 to wait and see what made sense there. Keith
12 Maeb had proposed something, and I think it was
13 something like 2 percent of the enterprise value
14 or something. You know, it struck me it was --
15 it was definitely like 1 and half or 2 percent
16 of the entire enterprise value upon
17 confirmation.

18 Q. I believe you testified earlier that a
19 general fee discussion was among yourself and
20 Paul?

21 A. Yes.

22 Q. Is that correct?

23 A. Yes.

24 Q. That's prior to the execution of the
25 engagement letter?

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3 with the 250, accepted the 250?

4 A. I had talked to Paul and pushed back
5 and said, why 250? I mean, I'm more comfortable
6 with 200 or, you know, Greenhill's at 175, and
7 Paul said that it wasn't -- I'm just -- my
8 recollection is that Paul said something like:
9 This isn't a number I pulled out of the air,
10 here's what went into it. I've discussed this
11 with Dan and Royce.

12 And I think my approach was, look,
13 lower numbers are better than higher numbers,
14 but I'm happy to listen to your arguments and
15 I'll talk to Dan and Royce and then I'll get
16 back to you and let you know if we think this is
17 reasonable. And I did that. I said to Dan -- I
18 remember specifically talking to Dan saying,
19 what do you think about this? And, you know, we
20 just decided to come back and take that, take
21 that number.

22 Q. And the board signed off on that
23 \$250,000?

24 A. Yes.

25 Q. Do you believe that \$250,000 that was

□

39

1 Tresnowski
2 discussed reflected the market price for those
3 services to be provided?

4 A. I thought it was a reasonable price
5 under the circumstances, and the reason I answer
6 it that way is that there were -- you know, what

7 I want to stress is there was a big difference
8 in the candidates we saw, and so -- and they all
9 operated differently was the impression we
10 strongly had as a management team.

11 And one of the things with Impala that
12 we saw was an opportunity to get a, you know,
13 you would get, in one package, you would get a
14 CRO, a former kind of credit officer,
15 understands credit agreements inside and out;
16 you would get a, in Paul's case, a guy who was
17 at McKinsey for, I don't know, ten years or
18 something; and so you were getting a whole
19 bundle of things that we just clearly weren't
20 getting from the others, and that's why I say it
21 was very easy decision to make.

22 So, was it market? I don't know that
23 we even thought of it that way. Was it a fair
24 compensation for what we were getting? We
25 thought it was.

□

40

1 Tresnowski
2 Q. You said you thought it was reasonable
3 under the circumstances.

4 A. Yes.

5 Q. What were the circumstances?

6 A. What they brought to the table. We
7 thought it was a -- we were getting a lot of
8 different things. That's why, when you had
9 talked about their role, I mean, I know what I

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thought about Paul and Pete, and I met them
11 both, I certainly didn't want to say, do these
12 things and don't do these things. If you guys
13 see other problems here, have at it, just let's
14 get as much as we can.

15 Q. I would like to turn your attention to
16 the thin document that's in front of you. It's
17 a notice of hearing on motion of the debtors
18 pursuant to Sections 105 and 363 of the
19 bankruptcy code for approval of services
20 agreement with the Impala Partners, LLC.

21 If you take a minute and just flip
22 through that.

23 A. Yes, I'm familiar with that.

24 Q. And what is it?

25 A. This is the -- it's the, what I would

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1 Tresnowski
2 call is the notice of hearing to approve the
3 final success fee arrangement and the
4 modification to the monthly fees that we had
5 reached with Impala.

6 MR. DUBLIN: I would like to mark this
7 as Tresnowski Exhibit 2.

8 (Tresnowski Exhibit 2, Notice of
9 Hearing on Motion of the Debtors Pursuant to
10 Sections 105 and 353 of the Bankruptcy Code
11 for Approval of Services Agreement with
12 Impala Partners, LLC, marked for
13 identification, as of this date.)

14 Q. Were you the person primarily
15 responsible for negotiating the terms of this
16 modification to the engagement letter to the
17 debtors?

18 A. I was primarily responsible, yes.

19 Q. Who else was responsible?

20 A. Royce was involved, Dan was involved,
21 members of our board were involved. When I say
22 "involved," I mean they were considering it and
23 approving it, but I was the one taking proposals
24 back and forth and negotiating with Paul.

25 Q. If you look at page 2 of the notice --

□

42

1 A. Yes. Tresnowski

2

3 Q. -- the second paragraph, the second
4 full paragraph on that page says "that the
5 debtors and Impala, after negotiations, have
6 agreed on the terms of a success fee."

7 A. Uh-huh.

8 Q. What do you view a success fee to be?

9 A. You know, it's a fee that you get when
10 the job's done and, you know, you have delivered
11 what you were engaged to deliver.

12 Q. Do you need to have a success in order
13 to have a success fee?

14 A. I think that's more nomenclature than
15 anything you can read a lot into. I mean,
16 there's -- as I get schooled in this process of

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17 bankruptcy, a lot of people get paid what are
18 called success fees, and you know, as far as I
19 can see, they're fees that get paid at the end
20 of the case. And again, I'm not an expert, but
21 my sense is that, you know, if they have done
22 their job and delivered, you know, they get
23 that. If they haven't for some reason, if they
24 get dismissed or something, they would just take
25 whatever they got paid through that date.

□

43

1 Tresnowski
2 But I really, you know, I really view
3 the word "success" as just, you know, a label.
4 Q. What is the proposed success fee for
5 Impala in these cases?
6 A. \$2 and a half million.
7 Q. Is it your understanding that Impala
8 is entitled to the success fee upon confirmation
9 of any plan of reorganization or upon a sale of
10 substantially all of the debtors' assets?
11 A. Yes.
12 Q. Is that without regard to the
13 provisions of that plan or without -- I'm sorry,
14 without regard to the provisions of the plan?
15 A. That's correct.
16 Q. Is that without regard to any
17 consideration that may be received by the estate
18 in connection with the sale of substantially all
19 of the debtors' assets?
20 A. That is correct.

21 Q. So what exactly does Impala have to do
22 in order to earn the success fee?

23 A. They have to perform the services that
24 we engage them to perform, see the process
25 through to fruition, and then they would earn

□

44

1 Tresnowski
2 the fee.

3 Q. What are the services that the company
4 engaged them to perform?

5 A. Well, as I testified earlier, there
6 was a, you know, whole host of services, and the
7 significant -- you know, there's lots of
8 significant ones. They include helping us cut
9 costs, and last count, I think we have cut over
10 \$80 million of annual cost out of the business;
11 helping us put together a very detailed, very
12 thorough business plan and financial forecast.
13 And they have done that.

14 And they were engaged to explain that
15 forecast, defend it, and, if they did their job
16 well, establish its credibility. And again,
17 from my feedback I've gotten, they have done
18 that very well. It's been very well received.
19 And people have difference of opinion on
20 assumptions, which you would expect, but I've
21 not heard any suggestion that it was anything
22 less than what we had wanted, you know, which
23 was a very detailed, thorough, thought-out plan.

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24 They have been involved in issues of
25 communication with employees, letters to

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1 Tresnowski
2 customers, how do you try to retain your
3 revenue. They have been involved of late in
4 go-to-market strategy, how can you sell more
5 products and fill up the network. And so, I
6 mean, I can go back through the engagement
7 letter, but they have done all the things,
8 generally, that they have been engaged to do.
9 And they continue to do it. I mean, the
10 engagement's not over.

11 Q. But none of these -- the engagement
12 letter does not provide that any of these things
13 need to be completed in order for Impala to
14 obtain the success fee?

15 A. No. No. The success fee is only
16 contingent on a -- the confirmed plan or a sale
17 of the company.

18 Q. Who negotiated the success fee on
19 behalf of Impala?

20 A. Primarily, Paul Street.

21 Q. And did Impala make the first offer to
22 the company or did the company make an initial
23 proposal to Impala? We're talking just about
24 the success fee.

25 A. The success fee, I think Impala

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3 the other number. I mean, we didn't draft the
4 document, but that was clearly my understanding.
5 The way we were going to draft it is that that
6 was a failsafe, if you will. If they were
7 deprived -- you know, if they had devoted all
8 their time and energy and allocated resources to
9 it, and then we sold the company out from under
10 them, that would be their compensation.

11 Q. Was this initial proposal in writing?

12 A. I think so. I mean, actually, I don't
13 know if I memorialized it in writing or if they
14 gave it to me in writing. There was a writing
15 that may have had this in it. It may have just
16 been my notes. I don't recall.

17 Q. To the extent you have those notes of
18 that writing, we would like to get a copy of
19 that as well.

20 A. Sure.

21 Q. What did the company do with this
22 initial proposal?

23 A. We immediately sat down with Pete and
24 Paul and talked about it and we asked, you know,
25 how they came up with it, what were their

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48

1 Tresnowski
2 thoughts, and then we said, okay, we'll think
3 about it, we'll talk to the board about it.

4 And then we were also getting input
5 from the creditors at that point. I mean, this
6 was something that both the unsecured creditors

7 and the senior creditors -- secured creditors,
8 rather, were saying, you know, what are you
9 going to do about Impala, what's their fee going
10 to be, and so there was a lot of discussion
11 about it.

12 Q. What was the company's
13 counterproposal?

14 A. Unfortunately, we didn't make one.
15 Then we were, you know, we were struggling, to
16 be honest with you, to -- we wanted something
17 that was fair. I mean, there was no question in
18 our mind that they were delivering value and
19 they were going to be a very important part of
20 the process, and there was no question in our
21 mind that they were folks who could go out and
22 earn lots of money doing engagements for other
23 people. So if we couldn't come to terms with
24 them, they would go get that money someplace
25 else.

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1 Tresnowski
2 So we had a real good sense of what
3 their market value was. We had a real good
4 sense of how important they were in our process.
5 And we struggled a bit, you know. We wanted to
6 make -- we wanted to avoid a fight with the
7 creditors. We wanted to do something the
8 creditors thought would be fair. So there was
9 dialogue going back and forth.

10 We spent a lot of time internally
11 debating success. You know, if you're going to
12 do a success fee -- and this was a recurring
13 theme throughout the whole bankruptcy process
14 with, you know, whether it's our own curb or
15 engagement of any professional or whatever, you
16 know, you sit there and say, well, what's
17 success?

18 And, you know, for every formulation
19 you can come up with, you can come up with
20 deficiencies in that formulation that might lead
21 you astray, that might lead you to do things
22 that weren't good for the enterprise, but they
23 were good for this constituency or vice-versa
24 and that you don't get a very satisfactory
25 response.

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1 Tresnowski
2 And again, I've been through this now
3 with, you know, went through it with Greenhill,
4 and I think we struggled quite a bit. Paul and
5 I talked about it, and I think we were both
6 unhappy that we hadn't resolved it and it had
7 lingered, frankly.

8 The agreement we had with them was to
9 get them a proposal -- well, to get it done in
10 like 30 days after their engagement, and then we
11 had like a 15-day slippage where we would get
12 together and negotiate it if we had any
13 differences. And we had, somewhat unfairly to

14 Impala, we had kind of blown past those
15 deadlines, and they were still working away and
16 we were kind of getting down to the end of
17 August.

18 And I think frankly because it was
19 such a difficult issue that, you know, we
20 just -- we couldn't come to a resolution, and
21 then finally we just said, look, we got to do
22 something here. You guys are valuable, you can
23 go do things for other people and make a lot
24 more money than certainly just making your
25 monthly, and we need you guys.

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1 Tresnowski
2 Our board felt adamant, absolutely
3 adamant, that it would be a huge setback in the
4 case if we lost Impala, and we said -- and I
5 don't recall the exact sequence of
6 conversations, but the gist of it was like, hey,
7 Paul, let's do something here, let's cut a deal,
8 let's make it simple, everyone's getting tangled
9 up, if I can say it, in their underwear trying
10 to figure out how do you define success, and we
11 just said let's just cut a deal, let's just get
12 certainty on both sides, we know what we're
13 going to pay, you guys are, unfortunately
14 because of circumstances and maybe because of
15 our own delay, you guys have performed, you
16 know, some significant percent of the work to be

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done.

18 So there wasn't a lot of risk that we
19 weren't going to get stuff from them, because
20 they had done it and they had lived with us for
21 going on three months now. So we just said,
22 after many meetings and board meetings or board,
23 you know, individual conversations with board
24 members, we just said, here's the deal, we've
25 gone back and forth and back and forth and back

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52

1 Tresnowski
2 and forth, here's the deal, we think it works,
3 they think it works, let's get on with it.

4 Q. Let's just take a step back.

5 A. Sure.

6 Q. You referenced that you went back and
7 forth and back and forth.

8 A. Uh-huh.

9 Q. And please correct me if I'm wrong, I
10 take that to mean you went back and forth on how
11 much the success fee should be?

12 A. It wasn't -- no, it wasn't a numbers
13 type of discussion. There were numbers --
14 obviously there were numbers engaged in it, but
15 it was, you know, the issue was do we put these
16 guys at risk somehow in a success formula and
17 then maybe there's a higher payout, or do we
18 have less risk at a lower payout that's certain,
19 which means we run some risk then because
20 they're going to get the payout, you know, just

21 when there's a plan. So I think the back and
22 forth was more on concepts than anything else.

23 Q. What was the debtor's reasoning in
24 removing the metric concept that Impala had
25 included in its original construction to go down

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1 Tresnowski
2 to a flat fee arrangement?

3 A. Yes, that is something we didn't do
4 lightly. And I know that's not an unusual way
5 to structure these fees. The problem we had
6 with that is that -- and Impala was sensitive to
7 this too, you know -- cutting costs is not an
8 absolute good. You know, it's good up to a
9 point and then it can turn bad.

10 And you know, we had talked about,
11 well, you could just have an incentive based on
12 cost-cutting, which was kind of like their
13 proposal, and the board of directors could be
14 the governor on that, but we didn't want to
15 really get in a situation where, for example,
16 Paul said, ghees, I think we should close the
17 XYZ facility, I really think that's the right
18 thing to do, and then we would have to evaluate
19 that -- not we, but mainly the board, knowing
20 that it came out of his pocket.

21 You know, I mean, it wasn't a good
22 dynamic that we wanted to have, because we
23 hadn't -- we had worked in a very open fashion,

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24 you know, where we did the right thing. That's
25 kind of the -- you do the right thing. And so I

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1 Tresnowski
2 think that made us uncomfortable.
3 The same thing with getting a plan
4 filed. As I told -- in a different context I've
5 told people, I said no one wants to get a plan
6 filed faster than the people working on this
7 deal, I mean, across the board. And so I didn't
8 need -- I didn't feel like I needed an economic
9 incentive for everyone -- anyone to try to get
10 this thing done.
11 And that includes -- I mean, I know
12 the argument you can make, well, they're getting
13 a monthly fee and so the longer it goes, the
14 better, but these are guys that have got other
15 opportunities, other demands, and not something
16 I could -- didn't really have any concern about
17 them sitting around milking the engagement.
18 That was not -- I wouldn't have -- I don't think
19 we would have engaged someone where we would
20 have those types of concerns.
21 Q. Did the company look at comparable
22 success fees in other cases?
23 A. We did. We certainly did do that, and
24 we did have -- we had a number of things. And
25 I'll caution you there's some documents, there's

3 Q. He's a very good baseball player this
4 year.

5 A. If I can get it in the record, the
6 Cubs yesterday.

7 MR. RATHKOPF: It may be the only
8 time.

9 A. Let's get back on track here.

10 But one of the things we struggled
11 with is they looked at the -- we looked at the
12 comparables, and you have what I call CRO firms
13 and they do CRO engagements, they do one after
14 the other, and they have a very standardized way
15 of going about it, and then you have firms that
16 don't fit the mold as well.

17 And I had talked to Paul about this,
18 and he said, you know, we do all kinds of
19 engagements. And I said, well, send me a bunch
20 of letters, send me engagement letters so I can
21 see them and get a sense. And he sent those to
22 me. And again, it was very much -- the
23 decision-making process on our end was very much
24 what are these particular folks worth in this
25 particular situation, but certainly not without

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1 Tresnowski
2 regard to market comparables, because those are
3 relevant.

4 Q. Can you recall any -- first, I would
5 like to get copies of those engagement letters
6 that Paul sent to you.